No. 91-317

IN THE

Supreme Court of The United States

OCTOBER TERM, 1991

FRANCESCO DELORENZO
AND
FELICE SESTITO,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Fourth Circuit in its appellate review of the case at bar erred in not overturning the convictions of Francesco DeLorenzo and Felice Sestito because the trial court erroneously so limited the scope of Petitioners' cross examination of the government's star witness, as to deny Petitioners the right to effectively confront the witness, and to deny them a fair trial in violation of the Fifth and Sixth Amendments to the United States Constitution?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Constitutional Provisions

Statutes

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

FRANCESCO DELORENZO

and

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THE UNITED STATES OF AMERICA,

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The Petitioners, Felice Sestito and Francesco DeLorenzo, respectfully pray that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on May 3, 1991, and the denial of a Petition for Rehearing and Suggestion For Rehearing En Banc, entered on June 4, 1991.

OPINIONS BELOW

The opinion of the United States District Court for the District of Maryland is unreported in United States v. DeLorenzo and Sestito, No. JH 89-0269 (D.Md. 1990). The opinion of the United States Court of Appeals for the Fourth Circuit is unreported in United States v. DeLorenzo, No. 90-5800 (4th Cir. 1991); United States v. Sestito, No. 90-5805 (4th Cir. 1991). Set forth as Appendix A is a copy of the opinion.

JURISDICTIONAL STATEMENT

The decision of the United States Court of Appeals for the Fourth Circuit was entered on May 3, 1991. A timely petition for rehearing and suggestion for rehearing en banc was filed; it was denied on June 4, 1991. Set forth as Appendix B is a copy of the order.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1). This Petition for Writ of Certiorari has been timely filed in accordance with Rule 20 of the rules of this Court.

STATUTORY PROVISIONS

U.S. Const. Amend. V.

No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law.

U.S. Const. Amend. VI.

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.

21 U.S.C. §841(a)(1).

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intelligently to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.

21 U.S.C. §846.

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

STATEMENT OF THE CASE

On July 19, 1989, Petitioners Sestito and DeLorenzo were indicted in the District of Maryland and were charged with conspiring to distribute cocaine, in violation of 21 U.S.C. §846, and 12 counts of distributing cocaine, in violation of 21 U.S.C. §841(a)(1).

At the conclusion of a three-week jury trial, Petitioner DeLorenzo was convicted of all 13 counts contained in the indictment and Petitioner Sestito was convicted of five of the thirteen counts. DeLorenzo was sentenced to a 69-month period of incarceration followed by four years' supervised release and a $75,000 fine. Sestito received a 63-month sentence followed by four years' supervised release and a $15,000 fine.

The facts necessary for resolution of the issues in this Petition for Certiorari are clear and compelling. After having been arrested for selling heroin to an undercover DEA agent in 1987, the government's star witness, Vincent Scotto, agreed to act as a government informant,

in exchange for the government's recommending that his cooperation be taken into account at the time of sentencing. As an informant, Scotto made "controlled buys" of drugs for the government; that is, he would purchase drugs from alleged dealers on behalf of the government. In the discovery materials which the government gave to Petitioners, prior to trial, was a transcript of Scott's grand jury testimony. However, details and identities of four other persons who were supplying Scotto prior to and during the conspiracy period alleged against Petitioners here were not disclosed by the government.

At trial, Scotto testified about his alleged cocaine purchases from DeLorenzo and Sestito, which occurred during the summer of 1988. During the cross examination of Scotto, the trial court abused its discretion by refusing to permit the defense to question Scotto concerning the identities of other sources supplying cocaine to Scotto, after it was revealed that Scotto was making other such

"buys" for the government during the same time period.

On February 5, 1991, Petitioners appealed the jury verdict and judgment of the United States District Court for the District of Maryland. Among the issues raised by Petitioners on appeal to the Fourth Circuit was whether the trial court erred by refusing to allow the defense to fully cross examine Scotto when it prohibited the disclosure of the names of drug sources supplying Scotto at the time of his alleged buys from Petitioners, depriving DeLorenzo and Sestito of information relevant to their defense and cross examination of Scotto. Following briefing and oral argument in the United States Court of Appeals for the Fourth Circuit, a panel of that court affirmed the conviction by unpublished opinion on May 3, 1991. A timely petition for rehearing and suggestion for rehearing en banc was filed; it was denied (see Appendix B). Petitioners here seek review of the decision of the United States Court of Appeals for the Fourth Circuit.

REASON FOR GRANTING THE WRIT

THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT SHOULD HAVE OVERTURNED THE CONVICTIONS OF FELICE SESTITO AND FRANCESCO DELORENZO BECAUSE THE TRIAL COURT ERRONEOUSLY DENIED PETITIONERS THE OPPORTUNITY TO CONFRONT THE WITNESS AGAINST THEM IN VIOLATION OF THE SIXTH AMENDMENT AND DENIED THEM A FAIR TRIAL IN VIOLATION OF THE FIFTH AMENDMENT WHEN IT SO LIMITED PETITIONERS' CROSS-EXAMINATION OF THE GOVERNMENT'S STAR WITNESS, AS TO DEPRIVE PETITIONERS OF A VALID AND POTENTIALLY SUCCESSFUL LINE OF DEFENSE.

The primary defense theory of Francesco DeLorenzo and Felice Sestito centered around the proposition that the cocaine Scotto turned over to FBI agents, which he alleged came from Petitioners, was actually obtained from sources other than DeLorenzo or Sestito. During the same time period in which Scotto was acting as a government informant in the alleged DeLorenzo-Sestito dealings, he was acting in a similar capacity for the government in unrelated investigations involving four alleged drug dealers. When the trial court refused to require the government to provide the names of

the four suspected dealers because of the supposedly on-going investigations, it stripped Petitioners of the ability to investigate relevant and extremely crucial information in preparation for trial.

In Pointer v. Texas, 380 U.S. 400 (1965), this Court first applied the right of confrontation to the states and in so doing, the court stressed the indispensability of cross examination to the adversarial process. "[P]robably no one, certainly no one with experience in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case." Id. at 404. Cross examination is the principal means by which the believability and credibility of a witness and the truth of his testimony are tested. See, Davis v. Alaska, 415 U.S. 308 (1974). The importance of full cross examination is necessarily increased when the witness that the accused seeks to cross examine is the "star" government witness, providing an essential link

in the prosecution's case. See, United States v. Calle, 822 F.2d 1016 (11th Cir. 1987), and United States v. Wesevich, 666 F.2d 984, 990 (5th Cir. 1982).

While the trial judge may limit the scope of cross examination, he may not exercise this discretion until "the constitutionally required threshold level of inquiry has been afforded the defendant." United States v. Tracey, 675 F.2d 433, 437 (1st Cir. 1982). Specifically, limitation of cross examination violates the Sixth Amendment if the excluded testimony would have affected the jury's impression of the witness' credibility. United States v. Leavitt, 878 F.2d 1329, 1339 (11th Cir. 1989). If a trial judge seeks to limit the scope of cross examination, he may do so only to preserve the witness' constitutional immunity from self-incrimination, to prevent attempts to harass, humiliate or annoy the witness, or where the information sought might endanger the witness' personal safety. See, Davis, 418 U.S. at 320; Hoover v. Maryland, 714 F.2d 301 (4th Cir.

1983), citing Chavis v. North Carolina, 637 F.2d 213, 226 (4th Cir. 1980). However, where the above factors are not present, substantial limitations on a defendant's attempt to undermine a witness' testimony and credibility constitutes constitutional error. Hoover, 714 F.2d at 305; see also, United States v. Mayer, 556 F.2d 245 (5th Cir. 1977).

The Sixth Circuit has held that depriving a criminal defendant of the names of other persons supplying drugs to a government informant who alleged to have bought the drugs from the defendant, violated the Sixth Amendment mandating reversal of the defendant's conviction. United States v. Pritchett, 699 F.2d 317 (6th Cir. 1983). The facts of Pritchett closely resemble those underlying this case; Pritchett was convicted of conspiracy to distribute controlled substances, based largely upon the testimony of a convicted felon-turned-government informant who claimed that Pritchett was a drug dealer. Id. at 318. The Sixth Circuit reversed the conviction of Pritchett

after finding that the trial court impermissibly restricted the scope of Pritchett's cross examination of Eaves, the informant, when it limited "Pritchett to the fact of another source without permitting establishment of whom [sic] the source actually was." Id. at 321.

As in Pritchett, the evidence against Petitioners consisted primarily of the testimony of the government's informant. In light of the fact that there were no "undercover buys" made by federal agents in the case at bar, the government's case-in-chief relied almost entirely upon the testimony of its "star" witness, Vincent Scotto. While the government also admitted into evidence intercepted wire communications and conversations recorded via a "body wire" allegedly worn by Scotto, the government needed Scotto's testimony to verify, explain and interpret these recordings, which consisted of nonincriminating language alleged to be encoded.[1] However, Scotto, like most

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[1] The language spoken was a relatively rare Italian dialect.

government informants, was involved in illegal activities, thus, his trustworthiness was not above reproach, and his testimony should have been carefully scrutinized. United States v. Wesevich, 666 F.2d 984, 985 (5th Cir. 1982). As with the government's star witness in Wesevich, Scotto's credibility was brought into question when he admitted participation in illegal drug-related activities. Since the jury was forced to rely largely upon Scotto's testimony in reaching its verdict, the evaluation of credibility of this witness was of critical importance to the outcome of this case.

The value to Petitioners of learning the identities of the other sources would have been two-fold. Had cross examination been permitted into the identities of persons who supplied Scotto with cocaine during the same period in which cocaine was allegedly obtained from the Petitioners, the defense would have garnered support for its independent source defense while at the same time expanding the avenues for investigation in preparation for trial. As the

United States Supreme Court has recognized, one's name is information which "opens countless avenues of in-court examination and out of court investigation." Smith v. Illinois, 390 U.S. 129, 131 (1968). In Smith, the Court reversed a criminal conviction where a police informant attempted to conceal his true identity during cross examination. Had Petitioners learned the names of the three sources, they would have questioned the three men about their dealings with Scotto, thus allowing thorough research into the facts of the case. Additionally, Petitioners could learn if the investigations against the three sources had been completed, more details of Scotto's role, and any other relevant information which the sources might divulge.

Moreover, "failure to permit cross examination of a key government witness concerning bias, prejudice, or motive cannot be construed reasonably as harmless error." Stevens v. Bordenkircher, 746 F.2d 342, 247 (6th Cir. 1984). Given the importance of thorough

cross examination to the ascertainment of a witness' credibility and character, any limitation of this activity is a potential threat to the defendant's constitutional rights. The inability to conduct thorough cross examination is an even greater threat when it deprives the defendant of a chance to develop facts and details crucial to his defense. Francesco DeLorenzo and Felice Sestito faced both obstacles when the trial court refused to allow the defense to investigate Scotto's credibility and the facts known to Scotto which surrounded the alleged dealings of DeLorenzo and Sestito.

Prior to Petitioners' trial, the government claimed a compelling interest in nondisclosure of the disputed identities to protect the confidentiality of an ongoing investigation. The Pritchett court, in response to an identical argument by the government, rejected the argument on practical and policy grounds. Since the media had disclosed to the public, including, presumably, to the unnamed

targets of the government's "ongoing investigations," that Eaves was a cooperating witness, "any damage that might have occurred to the government surveillance operation had . . . already occurred." Id. at 332. The Sixth Circuit relied on Davis v. Alaska, 415 U.S. 308 (1973), in which this Court refused to allow the state to withhold information of its witness's juvenile record at trial, as per state law, explaining that the state could not sacrifice the defendant's constitutional right to confront the witness by choosing a chief witness with a protected criminal record. Pritchett, 699 F.2d at 320. Similarly, the Sixth Circuit explained that the government in Pritchett could not "point to its interest in a separate criminal investigation as justification for abridgment of Pritchett's fundamental constitutional rights." Id.

So, too, the government should not have been allowed to effectively tie the hands of the defense by refusing to allow the disclosure of the names of four persons supplying drugs to

Scotto, at the same time of Scotto's alleged buys from Petitioners. Knowing the identities of Scotto's other sources would have allowed Petitioners to thoroughly trace Scotto's actions, so as to further substantiate their argument that the drugs Scotto alleged to have received from Petitioners actually came from one of Scotto's other drug suppliers. Perhaps the government should have chosen to use Scotto only in its DeLorenzo-Sestito investigation. Regardless of what the government should have done at the start of its investigation, it should not have been allowed by the trial court to silence its witness at the cost of Petitioners' constitutional rights.

CONCLUSION

For the foregoing reasons, Petitioners pray that this Court grant a Petition for Writ of Certiorari in order to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit in United States v. DeLorenzo and United States v. Sestito, supra.

Respectfully submitted,

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and

Frank J. Marine
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CERTIFICATE OF SERVICE

I, David B. Irwin, a member of the bar of the Supreme Court of the United States and counsel-of-record for Petitioner Francesco DeLorenzo, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Petition for Writ of Certiorari upon the respondent by depositing a copy of the same United States mail with proper address and adequate postage to:

Gregory Welsh
United States District Court
for the District of Maryland
820 U.S. Courthouse
101 W. Lombard Street
Baltimore, Maryland 21201;

Deborah Rhodes
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and

Frank J. Marine
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This 1st day of August, 1991.

David B. Irwin

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
June 4, 1991

No. 90-5800

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

FRANCESCO DELORENZO, a/k/a Frank

Defendant - Appellant

No. 90-5808

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

FELICE SESTITO, a/k/a Phillip

Defendant - Appellant

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellants' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Russell with the concurrence of Judge Wilkinson and Judge Smith, United States District Judge for the Eastern District of Virginia, sitting by designation.

For the Court,

_____

Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-5800

UNITED STATES OF AMERICA,
Plaintiff - Appellee,

versus

FRANCESCO DELORENZO, a/k/a Frank,
Defendant - Appellant.

No. 90-5808

UNITED STATES OF AMERICA,
Plaintiff - Appellee,

versus

FELICE SESTITO, a/k/a Phillip,
Defendant - Appellant

Appeals from the United States District Court for the District of Maryland, at Baltimore. Joseph C. Howard, District Judge. (CR-89-269-JH)

Argued: February 5, 1991 Decided: May 3, 1991

Before RUSSELL and WILKINSON, Circuit Judges, and SMITH, United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed by unpublished opinion. Judge Smith wrote the opinion, in which Judge Russell and Judge Wilkinson joined.

ARGUED: David Beckham Irwin, IRWIN, KERR, GREEN, MCDONALD AND DEXTER, Baltimore, Maryland; Harold Irwin Glaser, Baltimore, Maryland, for Appellants. Frank J. Marine, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. ON BRIEF: Breckinridge L. Willcox, United States Attorney, Gregory Welsh, Assistant United States Attorney, Deborah Rhodes, Assistant United States Attorney, Baltimore, Maryland, for Appellee.

SMITH, District Judge:

Francesco DeLorenzo ("appellant DeLorenzo") and Felice Sestito ("appellant Sestito") appeal various aspects of their cocaine-related convictions. On February 15, 1990, a jury returned a verdict, finding appellants DeLorenzo and Sestito guilty of conspiring to distribute cocaine in violation of 21 U.S.C. §846. The jury also convicted appellant DeLorenzo on twelve counts of distributing cocaine and convicted appellant Sestito on four counts of distributing cocaine, all in violation of 21 U.S.C. §841(a)(1), and 18 U.S.C. §2. Appellant DeLorenzo received a sentence of sixty-nine months imprisonment, to be followed by four years of supervised release, and was fined $75,000. Appellant Sestito received a sentence of sixty-three months imprisonment, to be followed by four years of supervised release, and was fined $15,000. Finding no reversible error, we affirm.

I.

The indictment charged that from in or about June 1988 until the date of the indictment, July 19, 1989, appellants, in the District of Maryland and elsewhere, conspired to distribute, and did distribute on numerous occasions, cocaine. The information provided by and through one Vincent Scotto ("Scotto") was crucial to the government's case against appellants.

Appellants owned separate business establishments in Aberdeen, Maryland. Appellant DeLorenzo owned Frank's Pizza and Subs, and appellant Sestito owned a gas station, Aberdeen Texaco. These establishments were located diagonally across the street from each other. Scotto owned Vinnie's Pizzeria in Claymont, Delaware, which is about fifty miles from Aberdeen. Scotto had known appellant DeLorenzo since 1970, and had known appellant Sestito since 1974.

Following his arrest for involvement in the illegal distribution of heroin and cocaine

from approximately 1983 to early 1988, Scotto, on April 27, 1988, entered into a plea agreement with the United States. Scotto agreed to cooperate with federal authorities in ongoing drug trafficking investigations and to plead guilty to a two-count criminal information charging him with conspiring to distribute heroin and with attempting to defraud the Mellon Bank of Delaware. In exchange for his cooperation and plea of guilty, the government agreed to inform the sentencing court of Scotto's assistance before imposition of sentence.

Pursuant to the plea agreement, Scotto agreed to record his conversations with appellants and others, and he agreed to testify against appellants. Accordingly, between mid-June 1988 and late June 1989, the government obtained numerous recorded conversations between

appellants and Scotto during which cocaine transactions were discussed or consummated.[1]

As Scotto testified, on twelve occasions from October 13, 1988, to April 6, 1989, he purchased cocaine from appellants under the control and direction of the government.[2] On eleven of those twelve occasions Scotto recorded, via a "body wire," the delivery of cocaine from appellant DeLorenzo. With two exceptions, Scotto's controlled purchases followed the same basic pattern, with the actual

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[1] Counsel for appellant DeLorenzo argued at trial and on appeal that never in the recorded conversations did appellants specifically use the term "cocaine" to identify the subject of the proposed or consummated transactions. Instead, appellants discussed the purchase and sale of "flour," "bottles," "potatoes," "tomatoes," "mozzarella," and "pigs feet," among other items. However, the evidence at trial, specifically the testimony of Scotto, was that these terms referred to "cocaine."

[2] On no occasion during the life of the alleged conspiracy did Scotto buy cocaine directly from appellant Sestito. However, appellant DeLorenzo told Scotto, and other evidence confirmed, that appellant Sestito was the supplier of the cocaine that appellant DeLorenzo in turn sold to Scotto.

delivery of cocaine taking place at appellant DeLorenzo's pizzeria.[3]

In addition to Scotto's controlled purchases, the government utilized various other means to obtain evidence against appellants. For example, the government procured long-distance toll records, installed Dialed Number Records (pen registers), and from February 15, 1989, to April 15, 1989, electronically monitored the calls placed and received on the telephones located at appellants' business establishments.

Appellants were taken into custody on July 18, 1989. On July 19, 1989, the Grand Jury for the district of Maryland issued a thirteen-count indictment charging appellants with one count of conspiracy, in violation of 21 U.S.C. §846, and twelve counts of distribution of cocaine, in violation of 21 Us.c. §841(a)(1), and 18 U.S.C. §2.

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[3] On October 21, 1988, and November 11, 1988, appellant DeLorenzo delivered cocaine to Scotto at Scotto's pizzeria.

Appellants filed several pretrial motions. By order of January 17, 1990, the trial court denied these motions and, in so doing, denied appellants' separately filed motions for a severance and denied appellants' joint motion to suppress the evidence secured by electronic surveillance.

Appellants' trial began on January 31, 1990. On February 15, 1990, the jury rendered its verdict, finding appellant DeLorenzo guilty on all thirteen counts, and finding appellant Sestito guilty on five counts, including the one count of conspiring to distribute cocaine. Following their convictions, appellants separately moved for new trials, but these motions were denied. Subsequently, the trial court sentenced appellant Sestito on May 3, 1990, and sentenced appellant DeLorenzo on May 14, 1990.

II.

On appeal, appellants assert error in regard to the following seven points: (1) the limitation on the scope of their cross-

examination of Scotto; (2) the prosecutor's comments on appellants' failure to testify; (3) the prosecutor's cross-examination of Vincenzo DeLorenzo; (4) the prosecutor's mischaracterization of the fingerprint evidence; (5) the trial court's comments made after the testimony of Albert DeProspero; (6) the trial court's denial of appellants' severance motions; and (7) the trial court's refusal to suppress the fruits of the government's electronic surveillance. We address each point in the order listed.

A.

Appellants claim that they were deprived of their Sixth Amendment right of confrontation and their Fifth Amendment right to a fair trial by their inability to cross-examine Scotto on the identities of other persons who supplied Scotto cocaine during the period of the alleged conspiracy. During discovery, the government, citing its need to withhold the identities of subjects of pending investigations, redacted from the materials produced to appellants the

names of four persons who sold narcotics to Scotto and the times of their recorded conversation with Scotto. Two of the four redacted identities were those of heroin suppliers, and the other two were those of cocaine suppliers. In response to appellants' asserted need for the redacted information, the government subsequently disclosed to appellants the identity of one of the two previously unidentified cocaine suppliers, Thomas Barker. Thus, the name of only one cocaine supplier was withheld from appellants.

On cross-examination of Scotto at trial, the trial court, while preserving the identity of the one undisclosed cocaine supplier, afforded appellants substantial leeway in their cross-examination of Scotto. Specifically, Scotto testified on cross-examination that during the period of the alleged conspiracy, four persons sold him drugs; two of the four sold him heroin; and Thomas Barker was one of the two cocaine suppliers. Furthermore, Scotto provided the details of his purchases of cocaine

from Barker and the other unnamed cocaine supplier, and also named five other persons who supplied him cocaine during the five years preceding the alleged conspiracy.

The right of confrontation and cross-examination, though precious, is not without limitation. United States v. Cole, 622 F.2d 98, 100 (4th Cir.), cert. denied, 449 U.S. 956 (1980). Absent an abuse of discretion clearly prejudicial to the defendant, the trial court may limit the extent of cross-examination. United States v. Gravely, 840 F.2d 1156, 1163 (4th Cir. 1988) (citing with approval United States v. Atwell, 766 F.2d 416, 419-20 (10th Cir.), cert. denied, 474 U.S. 921 (1985)). The trial court's limitation on Scotto's cross-examination clearly did not prejudice appellants. Appellants, who were permitted to cross-examine Scotto extensively about the sources and details of his drug transactions, in no way were hindered in presenting their defense that Scotto obtained cocaine from sources other than appellants. The only information that

appellants were unable to extract from Scotto was the identity of one cocaine source. Frankly, we find the name of this one cocaine source to be irrelevant to appellants receiving a fair trial, and, furthermore, we find that the district court accomplished the dual purpose of permitting effective cross-examination while not frustrating an ongoing investigation.

B.

Appellants contend that the prosecutor's rebuttal argument contained an improper comment on appellants' failure to testify. During rebuttal, the prosecutor remarked:

> Now, the second thing is counsel have raised the issue as to whether the voices that are identified in here as being the voices of DeLorenzo and Sestito are in fact their voices. Again, the only evidence that you have is that it is their voices. Not a single witness has taken that witness stand and said I listened to Memorex and Frank DeLorenzo is not on there, Phil Sestito is not on there, even though the government's book says it is. Even though counsel questions whose voices are on the tapes, the only evidence you have, and it's evidence that you can believe beyond a reasonable doubt, you can

> believe it beyond any doubt, is it is the voices of the defendants when their initials are shown in the transcripts.

Trial Transcript at 1169 (hereinafter referred to as "Tr.").

The test is well established for determining whether a prosecutor's remarks constitute an improper comment on a defendant's failure to testify: "Was the language used manifestly intended to be, or was it of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify?" Morrison v. United States, 6 F.2d 809, 811 (8th Cir. 1925), quoted in United States v. Anderson, 481 F.2d 685, 701 (4th Cir. 1973), aff'd, 417 U.S. 211 (1974), and United States ex re. Leak v. Follette, 418 F.2d 1266, 1269 (2d Cir. 1969), cert. denied, 397 U.S. 1050 (1970). Applying this test, we do not believe that the prosecutor's remarks can be fairly read as a comment on appellants' failure to testify. The prosecutor seems to have been commenting on those who took the stand, not on those who could

have but elected not to testify. We find nothing improper about these remarks. Furthermore, to the extent that the jury may have understood the prosecutor to be commenting on appellants' failure to testify, the trial court cured that impression by specifically instructing the jury that it could draw no adverse inference from appellants' failure to testify. See United States v. Lorick, 753 F.2d 1295, 1298 (4th Cir.), cert. denied, 471 U.S. 1107 (1985); United States v. Wooten, 688 F.2d 941, 947 (4th Cir. 1982); United States v. Whitehead, 618 F.2d 523, 527-28 (4th Cir. 1980).

C.

Appellant DeLorenzo asserts that the prosecutor's cross-examination of Vincenzo DeLorenzo, appellant DeLorenzo's brother, deprived him of a fair trial by suggesting that appellant DeLorenzo had ties to organized crime. On cross-examination, the prosecutor asked Vincenzo DeLorenzo if he ever had met Tony Anastasia. Tony Anastasia, before his death, reputedly was associated with organized crime.

Appellant DeLorenzo's counsel initially objected to the question, but he withdrew the objection after a bench conference. The prosecutor then asked basically the same question, probing Vincenzo DeLorenzo's familiarity with Tony Anastasia. Vincenzo DeLorenzo responded that although he knew of Tony Anastasia, he never had met him.

Contrary to appellant DeLorenzo's assertion, we find that he was not deprived of a fair trial by the prosecutor's cross-examination of Vincenzo DeLorenzo. First, by withdrawing his objection, appellant DeLorenzo failed to preserve properly this issue for appeal. Consequently, appellant DeLorenzo now asserts, as he must, that the admission of such testimony in the case constituted "plain error" under Rule 52(b) of the Federal Rules of Criminal Procedure.[4] The "plain error" standard of Rule

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[4] The government argues that appellant DeLorenzo "invited" the error, if any, by stating after the bench conference, "I'll withdraw the objection. I'm sorry. I would just like to know the answers before I object." Brief for the United States at 24 (Oct. 19,

52(b) of the Federal Rules of Criminal Procedure is a sparingly used exception to the contemporaneous objection rule that permits a reviewing court, in the absence of a timely objection, to correct particularly egregious errors that undermine the fundamental fairness of the trial and contribute to a miscarriage of justice. United States v. Young, 470 U.S. 1, 15, 16 (1985).

Applying this standard of review, nothing in the government's cross-examination of Vincenzo DeLorenzo constituted plain error. Contrary to appellant DeLorenzo's assertions, we fail to see how the prosecutor's question or Vincenzo DeLorenzo's answer prejudiced either appellant DeLorenzo or appellant Sestito. Vincenzo DeLorenzo denied knowing Tony

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1990) (quoting Tr. at 889). According to the government, these statements evinced a desire on the part of appellant DeLorenzo to have the witness answer the question and, as such, on appeal not even the "plain error" standard should apply. Id. Since we find no plain error, it is unnecessary to entertain the question of whether appellant DeLorenzo invited the alleged error.

Anastasia. Moreover, it was counsel for appellant DeLorenzo, when he cross-examined Scotto during the government's case-in-chief, who initially placed at issue appellant DeLorenzo's potential link to organized crime, in general, and Tony Anastasia, in particular.[5]

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[5] The following exchange took place between counsel for appellant DeLorenzo and Scotto:

> Q. Isn't it fair to say it became obvious to you on this day they're [FBI Agents] asking you about any potential connection of Frank DeLorenzo with organized crime, with the Mafia; that's what it was all about, right?
>
> A. Any question they ask, I cooperate, true.
>
> Q. You know that he knows a lot of Italians in New York and he helps you with money, but you don't know he's in the Mafia or anything like that, right?
>
> A. I never know.
>
> . . . .
>
> Q. Did you tell them that his [appellant DeLorenzo's] wife, whose name is Gloria, is a niece of Tony Anastasia?
>
> A. Yes.
>
> Q. Tony Anastasia is the brother of Albert Anastasia, a big mobster that got killed in New York about 30 years ago, right?
>
> A. Yes.
>
> . . . .

D.

Appellants argue they were denied a fair trial by the prosecutor's mischaracterization during his rebuttal argument of the fingerprint evidence introduced at trial. During the investigation of appellants, the government submitted to the Federal Bureau of Investigation's Crime Laboratory for fingerprint analysis ten paper bags, one paper cup, four pieces of paper, and one envelope. At trial, Special Agent Tyler, Federal Bureau of Investigation, was called as a defense witness by appellant Sestito. Tyler testified that of the latent fingerprints recovered from the items submitted for fingerprint analysis, none were

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A. It was something told to me from him [appellant DeLorenzo].

Q. You're saying that Mr. DeLorenzo said that?

A. That's correct. He told me that he was related.

Q. But you specifically told the FBI that Gloria DeLorenzo is a niece of the Anastasia? That's what you told him?

A. That's what I hear.

Tr. at 552, 592, 593.

identified as those belonging to appellant Sestito. In his rebuttal, however, the prosecutor stated:

> There was some talk about the fingerprint evidence. You will recall Special Agent Tyler's testimony about the fingerprint evidence was that she sent the materials to have them fingerprinted, and at the time that Sestito got arrested when she could get a full set of prints from him, there was nothing to compare it to. No readable prints have been recovered from the items, so it's a total wash. The fingerprint evidence does not help or hurt anyone in this case.

Tr. at 1175. The government concedes on appeal that the prosecutor mischaracterized Tyler's testimony. See Brief for the United States at 27. However, the government asserts, and we agree, that the prosecutor's mischaracterization was not so egregious as to warrant reversal.

At trial, appellants' counsel made no objection to the prosecutor's above-quoted rebuttal comments. Thus, the "plain error" standard of review governs this issue. Applying this standard, see supra at 11, the prosecutor's mischaracterization did not rise to the level of

plain error. Very simply, the evidence in this case was overwhelming. Nothing the prosecutor said or did contributed to a miscarriage of justice. Furthermore, we note that the prosecutor's closing remarks were not evidence in the case. Any danger of the prosecutor's mischaracterization improperly prejudicing appellants was minimized by the trial court's instruction to the jury that the prosecutor's comments were not evidence in the case.

E.

Appellants contend that the trial court's comments after the testimony of appellant Sestito's final witness deprived them of a fair trial. On the morning of February 13, 1990, the last day of testimony in the case, the trial court was forced to take an early recess, because appellant Sestito's final witness, Albert A. DeProspero, was absent from court. Consequently, the court was unable to reconvene until later that afternoon to hear the testimony of DeProspero. After DeProspero testified, the trial court, in the presence of the jury, stated

the following to defense counsel: "All of you understand that you have held this jury up. They could have been all the way home. We've been waiting for this one witness. But that's what it's all about." Tr. at 1032. At trial, defense counsel made no objection to these remarks. On appeal, appellants argue that, notwithstanding their failure to object at trial, they are entitled to a new trial because the trial court's comments evidenced its partiality and unduly influenced the jury. We disagree with appellants' argument on this point for three reasons.

First, if the trial court's remarks were as inflammatory and prejudicial as appellants now claim, they should have objected at trial. At oral argument, appellants attempted to justify their failure to contemporaneously object on the ground that an objection would have served only to exacerbate the prejudice. This argument is unpersuasive. An open court objection is not the only way an objection can be made. Nothing prevented appellants' counsel

from either asking the trial court for permission to approach the bench so they could object out of the jury's earshot, or, alternatively, from asking the trial court to excuse the jurors from the courtroom so they could object out of the jury's presence.

Second, since appellants failed to object at trial to the trial court's comments, we now review appellants' claim of judicial misconduct under the "plain error" doctrine, namely whether the trial court's comments affected substantial rights of appellants. See Fed. R. Crim. P. 52(b); supra at 11. After a thorough examination of the record, we conclude that the trial court's comments did not constitute plain error and did not affect the substantial rights of appellants. Rather, given the circumstances which prompted the trial court's remarks, the trial court's comments can at best be viewed as reasonable, and at worst be viewed as improvident.

Third, even if error, the trial court's jury instructions cured any conceivable

prejudice. See, e.g., United States v. Billups, 692 F.2d 320, 327 (4th Cir. 1982), cert. denied, 464 U.S. 820 (1983). The trial court instructed the jury, "[Y]ou are not to be influenced by any of my comments, questions or demeanor; indeed, nothing I have said[,] asked[,] or done is intended to convey to you what I think your decisions ought to be." Tr. at 1188.

F.

Appellants argue they were deprived of a fair trial by the trial court's denial of their separately filed severance motions. Specifically, appellants maintain that they suffered severe prejudice as a result of their joinder for trial, because their defenses were conflicting and antagonistic.

Rule 14 of the Federal Rules of Criminal Procedure governs relief from prejudicial joinder. Pursuant to Rule 14, "[i]f it appears that a defendant . . . is prejudiced by a joinder of offenses or of defendants . . . for trial together, the court may . . . grant a severance of defendants or provide whatever

other relief justice requires." The issue of severance lies within the sound discretion of the trial court, however, and its determination "will not be disturbed 'unless the denial of a severance deprives the defendants of a fair trial and results in a miscarriage of justice.'" United States v. Parodi, 703 F.2d 768, 780 (4th Cir. 1983) (quoting United States v. Becker, 585 F.2d 703, 706 (4th Cir. 1978), cert. denied, 439 U.S. 1080 (1979)).

Applying these principles to the facts of this case, the trial court's refusal of severance was not an abuse of discretion, as appellants were not prejudiced or denied a fair trial by their joinder.[6] Moreover, the trial court's finding that joinder was appropriate in this case is consistent with this court's prior observation that "[o]rdinarily, persons, properly joined in an indictment, are to be

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[6] At a threshold level, we disagree with the appellants' assertion that they pursued antagonistic defenses at trial. The record shows appellants pursued a common defense that Scotto obtained the cocaine in question from a third-party source and not from either appellant DeLorenzo or appellant Sestito.

tried together and this is particularly so if a conspiracy is charged." Parodi, 703 F.2d at 779.

G.

Appellants' final assignment of error is the trial court's refusal to suppress the contents of intercepted wire communications. Pursuant to court order, the government, from February 15, 1989, to April 15, 1989, conducted electronic surveillance of the telephone lines connected to appellant DeLorenzo's business, Frank's Pizza and Subs, and appellant Sestito's business, Aberdeen Texaco.[7] Prior to commencement of trial, appellants unsuccessfully moved to suppress the fruits of the government's electronic surveillance on the ground that the government failed to establish sufficient "necessity" to warrant the issuance of an electric surveillance order. Appellants

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[7] The government obtained the initial wiretap order on February 15, 1989, and subsequently received an extension of that order on or about March 16, 1989.

essentially have renewed on appeal the argument contained in their pretrial motion.

Pursuant to 18 U.S.C. §2518(1)(c), an application for an electronic surveillance order must contain "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous." Title 18 U.S.C. §2518(3)(c), in turn, provides that before a court issues an electronic surveillance order it must determine on the basis of the facts submitted by the applicant that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous."

The "necessity" requirement of 18 U.S.C. §2518 is designed to ensure that "wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime." United States v. Kahn, 415 U.S. 143, 153 n.12 (1974). However, 18 U.S.C. §2518 does not require the government to exhaust every

conceivable technique before applying for a wiretap. See United States v. Clerkley, 556 F.2d 709, 715 (4th Cir. 1977), cert. denied, 436 U.S. 930 (1978). The showing of need under 18 U.S.C. § 2518 must be tested in a practical fashion. Id. at 714. Furthermore, an issuing court has considerable discretion to authorize an electronic surveillance. While a court of appeals reviews de novo whether the applicant submitted a full and complete statement of facts in compliance with 18 U.S.C. §2518(1)(c), the issuing court's decision under 18 U.S.C § 2518(3)(c), that the electronic surveillance was necessary, is reviewed for an abuse of discretion. United States v. Brone, 792 F.2d 1504, 1506 (9th Cir. 1986).

Applying these principles, we find that the government's application for an electronic surveillance order complies with 18 U.S.C. §2518(1)(c), and the issuing court did not abuse its discretion. The government supported its application for an electronic surveillance order with a thirty-four page affidavit of Special

Agent Lano, Federal Bureau of Investigation. That affidavit showed with sufficient specificity that although the government had some success in gathering evidence by other investigative techniques, interception of wire communications was needed to fully develop a prosecutable case. Accord United States v. Commito, 918 F.2d 95 (9th Cir. 1990). Therefore, it was not an abuse of discretion to issue the electronic surveillance order and, consequently, the trial court committed no error in admitting into evidence the fruits of that electronic surveillance.

III.

For the foregoing reasons, we find no reversible error appellants' convictions are

AFFIRMED.

T655